Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

Carole Keeton Rylander, Comptroller of
Public Accounts of the State of Texas, and
John Cornyn, Attorney General of the State of Texas,
Petitioners,

v.

The Dow Chemical Company,
Respondent.

On Petition for Writ of Certiorari to
the Third Court of Appeals of Texas

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

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C. Excerpts from Dow Chemical's Motion for Summary Judgment C-1

APPENDIX A

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED JANUARY 25, 2001

NO. 03-00-00354-CV

Dow Chemical Company, Appellant

v.

Carole Keeton Rylander, Comptroller of Public Accounts of the State of Texas; and John Cornyn, Attorney General of the State of Texas, Appellees

APPEAL FROM 250TH DISTRICT COURT OF TRAVIS COUNTY BEFORE JUSTICES KIDD, YEAKEL AND JONES; JUSTICE JONES NOT PARTICIPATING REVERSED AND RENDERED -- OPINION BY JUSTICE YEAKEL

THIS CAUSE came on to be heard on the record of the court below, and the same being considered, because it is the opinion of this Court that there was error in the trial court's summary judgment: **IT IS THEREFORE** considered, adjudged and ordered that the judgment of the trial court is reversed, and judgment is rendered granting Dow Chemical Company's motion for summary judgment. **It is FURTHER** ordered that the appellees pay all costs relating to this appeal, both in this Court and the court below; and that this decision be certified below for observance.

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-0040354CV

Dow Chemical Company, Appellant

v.

Carole Keeton Rylander, Comptroller of Public Accounts of the State of Texas; and John Cornyn, Attorney General of the State of Texas, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 250TH JUDICIAL DISTRICT, No-9905725, HONORABLE MARY PEARL WILLIAMS, JUDGE PRESIDING

Appellant Dow Chemical Company ("Dow") appeals from the district court's summary judgment in favor of appellees, Carole Keeton Rylander, Comptroller of Public Accounts of the State of Texas, and John Cornyn, Attorney General of the State of Texas, denying Dow a refund of taxes previously paid.[1] Dow also appeals the district court's denial of its own motion for summary judgment. We will reverse the district court's summary judgment and render judgment granting Dow's motion for summary judgment.

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[1] The interests of the comptroller and the attorney general do not diverge. We will therefore refer to them jointly as the "Comptroller."

FACTUAL AND PROCEDURAL BACKGROUND

Dow is a Delaware corporation headquartered in Michigan and authorized to do business in Texas. *See* Tex. Bus. Corp. Act Ann. art. 8.05 (West Supp. 2001). Dow owns real and personal property in Texas. Although the property is located in Texas, Dow insures it through out-of-state insurance companies. These insurance companies are not authorized to sell insurance in Texas. Texas terms such insurance -- covering Texas risks but purchased from out-of-state insurance companies--"independently procured insurance" and imposes a tax on it. *See* Tex. Ins. Code Ann. §§101.252, .053(b)(4) (West Supp. 2001). Dow is required to file reports with and pay the tax to the Comptroller. *See id.* §101.252(a).

The Comptroller audited Dow for the period January 1, 1991 through December 31, 1997. *See* Tex. Tax Code Ann. §111.004 (West 1992). As a result of the audit, the Comptroller assessed Dow $427,148.80 for independently procured insurance taxes, penalties, and interest. *See* Tex. Ins. Code Ann. §101.252. Dow paid the assessment under protest and filed this suit in district court seeking a refund of its payment. *See* Tex. Tax Code Ann. §112.151 (West Supp. 2001); Tex. Gov't Code Ann. §§403.201-.204 (West 1998). The parties submitted competing motions for summary judgment. The district court granted summary judgment in favor of the Comptroller and denied Dow's motion. By one issue, Dow appeals, asserting that the district court erred in granting the Comptroller's motion and denying its motion for summary judgment.

DISCUSSION

Dow Chemical's Failure to Provide Notice

The insurance code requires that an insurer or other person

who claims an exemption based on the United States Constitution must file notice of the claim with the commissioner of insurance before commencing operations. *See* Act of May 27, 1985, 69th Leg., R.S., ch. 918, §3, 1985 Tex. Gen. Laws 3088, 3090 (Tex. Ins. Code Ann. art. 1.14-1, §14, since repealed and codified at Tex. Ins. Code Ann. §101.004 (West Supp. 2001)).[2] Initially, the Comptroller urges, but does not assert as error, that the notice provision applies to Dow because of the "State's substantial interest in regulating insurance." The Comptroller "raise[s] this issue only as a defensive matter" and argues that this Court "should consider remanding the case if it finds this issue controlling." We do not.

The goal of statutory construction is to give effect to the intent of the legislature. *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex. 1994). If language in a statute is unambiguous, a court must seek the intent of the legislature as found in the plain and common meaning of the words and terms used. *Id.*

Section 101.004(a) of the insurance code states that Texas's independently procured insurance tax does not "apply to an insurer or other person to whom, under the constitution or statutes of the United States or the constitution of this state, it may not apply." Tex. Ins. Code Ann. §101.004(a) (West Supp. 2001). Section 101.004(b) continues, "Before commencing operations, an insurer or other person claiming an exemption described by Subsection (a) must file with the commissioner: (1) notice of the claim; and (2) documents supporting the claim." *Id.* §101.004(b). Although she states that the phrase "before commencing operations" is "admittedly obscure," the Comptroller urges us to hold that it is "broad enough to cover Dow's operations." However, the

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[2] Although the original statute has been repealed and codified, the changes are not substantive, and we will cite to the current code for convenience.

language of this section demonstrates that it is not meant to apply in the manner the Comptroller suggests. A close look at the policy and purpose behind the statute illustrates this point. The portion of the insurance code to which this section now refers is chapter 101, entitled "Unauthorized Insurance." *Id.* §101.001. Its policy and purpose section states, "It is a state concern that many residents of this state hold insurance policies issued by persons or insurers who are not authorized to do insurance business in this state .... These residents face often insurmountable obstacles in asserting legal rights under the policies in foreign forums under unfamiliar laws and rules of practice." *Id.* §101.001(a). The section continues that "it is the policy of this state to protect residents against acts by a person or insurer who is not authorized to do business in this state." *Id.* §101.001(b). Dow is not an insurer, nor has it engaged in unauthorized insurance business.

In addition, the notice requirement on which the Comptroller relies was enacted in 1985. *See* Act of May 27, 1985, 69th Leg., R.S., ch. 918, §3, 1985 Tex. Gen. Laws 3088, 3090 (Tex. Ins. Code Ann. art. 1.14-1, §14, since amended). Using the application the Comptroller urges, Dow would have been required to provide notice before the notice provision was ever enacted if Dow commenced operations prior to 1985. Such a result does not follow logic. Construction of the plain language of statutes must avoid absurd results if the language will allow. *See Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 867 (Tex. 1999). We hold that the notice requirements of the insurance code do not apply to Dow.

Texas's Independently Procured Insurance Tax

The parties do not dispute the facts of this case and, in their motions, both assert a right to summary judgment as a matter of law. Because the propriety of summary judgment in this case is a question of law, we review the district court's decision *de novo*.

See McCarthy Bros. Co. v. Continental Lloyds Ins. Co., 7 S.W.3d 725, 728 (Tex. App.-Austin 1999, no pet.); *Rylander v. 3 Beall Bros. 3, Inc.*, 2 S.W.3d 562, 566 (Tex. App.--Austin 1999, pet. denied). When both sides move for summary judgment and the trial court grants one motion and denies the other, we review the summary-judgment proof presented by both sides and determine all questions presented. *Commissioners Court v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997). If we find error, we must render the judgment the trial court should have rendered. *Id.*

The validity of the tax before us has previously been presented to this Court, the Texas Supreme Court, and the United States Supreme Court. *See State Bd. of Ins. v. Todd Shipyards Corp.*, 340 S.W.2d 339 (Tex. Civ. App.--Austin 1960), *writ ref'd n.r.e.*, 343 S.W.2d 241 (Tex. 1961), *aff'd*, 370 U.S. 451 (1962). Ultimately, the United States Supreme Court held that Texas's independently procured insurance tax violated federal law, specifically the McCarran-Ferguson Act, 15 U.S.C.A. §§1011-15 (West 1997). *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 82 S.Ct. 1380, 8 L.Ed.2d 620 (1962).

A. *Todd Shipyards*

Prior to Congress's passage of the McCarran-Ferguson Act, the Supreme Court held that the Due Process Clause dictated that states could not tax the business of insurance. *See Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 58 S.Ct. 436, 82 L.Ed 673 (1938); *St. Louis Cotton Compress Co. v.* Arkansas, 260 U.S. 346, 43 S.Ct. 125, 67 L.Ed. 297 (1922); *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897). The Supreme Court has summarized these three cases as follows:

> The *Allgeyer* case held that Louisiana by reason of the Due Process Clause of the Fourteenth Amendment could not make it a misdemeanor to effect insurance on Louisiana risks with an

> insurance company not licensed to do business in Louisiana, where the insured through use of the mails contracted in New York for the policy. The *St. Louis Cotton Compress* case held invalid under the Due Process Clause an Arkansas tax on the premiums paid for a policy on Arkansas risks, made with an out-of-state company having no office or agents in Arkansas. The *Connecticut General Life Insurance* case held invalid under the Due Process Clause a California tax on premiums paid in Connecticut by one insurance company to another for reinsurance of life insurance policies written in California on California residents, even though both insurance companies were authorized to do business in California.

Todd Shipyards, 370 U.S. at 453-54, 82 S.Ct. 1380.

After its decisions in *Connecticut General*, *St. Louis Cotton Compress*, and *Allgeyer*, the Supreme Court held that the modern business of insurance was "interstate commerce."[3] *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 545-51, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). Interstate commerce implicates the Commerce Clause. *See id.* at 538-39, 64 S.Ct. 1162. The Commerce Clause provides Congress with the "positive power" to regulate such business. *Id.* at 552-53, 64 S.Ct. 1162. In *South-Eastern Underwriters*, the Court upheld

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[3] In several prior cases involving challenges to state regulation, the Court had held that the buying and selling of insurance was not commerce at all. *See New York Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495, 34 S.Ct. 167, 58 L.Ed. 332 (1913); *Hooper v. California*, 155 U.S. 648, 15 S.Ct. 207, 39 L.Ed. 297 (1895); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 19 L.Ed. 357 (1869).

congressional regulation of insurance. *See id.* at 562, 64 S.Ct. 1162. However, the Court did not hold that the states were necessarily prohibited from continuing to regulate insurance transactions and practices.[4] *See id.* at 534-62, 64 S.Ct. 1162.

Then in 1945, Congress passed the McCarran-Ferguson Act. The McCarran-Ferguson Act "provided that the regulation and taxation of insurance should be left to the States, without restriction by reason of the Commerce Clause." *Todd Shipyards*, 370 U.S. at 452, 82 S.Ct. 1380; *see* McCarran-Ferguson Act §§1011-15. But the history of the McCarran-Ferguson Act also provides"an explicit, unequivocal statement that the Act was so designed as not to displace" *Connecticut General*, *St. Louis Cotton Compress*, and *Allgeyer*. *Todd Shipyards*, 370 U.S. at 455, 82 S.Ct. 1380. In *Todd Shipyards*, the Supreme Court held that Texas's independently procured insurance tax violated McCarran-Ferguson. Curiously, such a holding from the United States Supreme Court has not dissuaded the Comptroller from levying this tax. But *Todd Shipyards* controls our analysis today. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

B. The Texas Tax

Today's question is whether Dow is engaged in the same insurance activities as was Todd Shipyards. At the time of *Todd Shipyards*, the independently procured insurance tax statute was

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[4] At the time of *South-Eastern Underwriters*, the Supreme Court had upheld state regulation of insurance in a number of cases. *See Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 63 S.Ct. 602, 87 L.Ed. 777 (1943); *Osborn v. Ozlin*, 310 U.S. 53, 60 S.Ct. 758, 84 L.Ed. 1074 (1940); *New York Life Ins.*, 231 U.S. 495, 34 S.Ct. 167, 58 L.Ed. 332; *Hooper*, 155 U.S. 648, 15 S.Ct. 207, 39 L.Ed. 297; *Paul*, 75 U.S. (8 Wall.) 168, 19 L.Ed. 357.

codified in article 21.38 of the insurance code and provided the following:

> If any person, firm, association or corporation shall purchase from an insurer not licensed in the State of Texas a policy of insurance covering risks within this State in a manner other than through an insurance agent licensed as such under the laws of the State of Texas, such person, firm, association or corporation shall pay to the Board a tax of five per cent (5%) of the amount of the gross premiums paid by such insured for such insurance.

Act of May 14, 1957, 55th Leg., R.S., ch. 395, §1, 1957 Tex. Gen. Laws 1180, 1181 (Tex. Ins. Code Ann. art 21.38, §2(e), since repealed and codified at Tex. Ins. Code Ann. §101.252 (West Supp. 2001)). In similar terms, the tax at issue in this case is applied as follows:

> Every insured who procures insurance in [transactions involving contracts of insurance independently procured through negotiations occurring entirely outside of this state which are reported and on which premium tax is paid] must file a report with the comptroller and pay an independently procured insurance tax of 4.85 percent.

Act of May 27, 1993, 73d Leg., R.S., ch. 999, §7, 1993 Tex. Gen. Laws 4373, 4373 (Tex. Ins. Code Ann. art 1.14-1, §12(a), since repealed and codified at Tex. Ins. Code Ann. §101.252). The statutes are essentially the same, and, with the exception of the rate, they result in the same tax.

The factual similarities between Todd Shipyards and Dow are also readily apparent:

> In both instances the insurance in question covered property in Texas owned by a foreign corporation.
> All of the insurers are domiciled outside of this state.
> All of the insurance agreements made the basis of the tax were contracted for, signed, issued, delivered, paid for, and accepted out of this state.
> None of the insurers has a permit or license from Texas to write insurance in the state and none of the insurers are subject to examination or subject to any control by this state.
> None of the insurers has an office or agent in Texas.
> None of the insurers investigated or adjusted claims within Texas.
> None of the insurers ever solicited Todd Shipyards' or Dow's insurance business or policies within Texas.
> None of the insurers communicated with either Todd Shipyards or Dow within the state.
> All decisions relative to the purchase and renewal of insurance, extent and amount of coverage, the selection of insurers and confirmation of insurance contracts are made outside of Texas.
> Under the policies, all losses are payable out-of-state and all premiums are paid out-of-state.

Because the law and the facts at issue today are essentially the same, we hold that the insurance at issue in *Todd Shipyards* is virtually identical to the insurance at issue in this case.

Due Process

The Comptroller urges us to ignore *Todd Shipyards* and apply a due-process analysis to the permissibility of a tax on independently procured insurance. The Comptroller argues that more recent due-process decisions have rejected "the meaningless formalisms of another era" and superseded *Todd Shipyards*. The

Comptroller continues that "it would be unreasonable to expect the [Supreme] Court to undertake the daunting clerical task of identifying all the decisions" superseded by the Court's current line of due-process decisions and formally overrule them. However, a due-process analysis is unnecessary. We discern no difference between the tax at issue in *Todd Shipyards* and the tax challenged today. We must adhere to precedent in the face of a United States Supreme Court case directly on point. *See Rodriguez de Quijas*, 490 U.S. at 484, 109 S.Ct. 1917. In *Rodriguez de Quijas*, the Fifth Circuit Court of Appeals declined to follow a prior and controlling decision of the Supreme Court, stating that the decision had been reduced to "obsolescence" by subsequent decisions of the Court . *Id.* at 479, 109 S.Ct. 1917. In reviewing the court of appeals decision, the Supreme Court stated, "If a precedent of this Court has direct application to a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* at 484, 109 S.Ct. 1917. State courts are no exception; this Court is bound by *Todd Shipyards* unless and until the Supreme Court overrules it. *See Owens Corning v. Carter*, 997 S.W.2d 560, 571 (Tex.), *cert. denied*, 528 U.S. 1005, 120 S.Ct. 500, 145 L.Ed. 3d 386 (1999).

CONCLUSION

We sustain Dow's issue on appeal, reverse the judgment of the district court, and render judgment for Dow granting it's motion for summary judgment.

Lee Yeakel, Justice

Before Justices Kidd, Yeakel and Jones;* Justice Jones not participating

Reversed and Rendered

Filed: January 25, 2001

Publish

* Before J. Woodfin Jones, Justice (former), Third Court of Appeals, sitting by assignment. *See* Tex. Gov't Code Ann. § 75.003(a)(1) (West 1998).

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

June 7, 2001

Mr. William E. Storie
Office of the Attorney General of Texas
P. O. Box 12548
Austin, TX 78711-2548

Mr. Ray H. Langenberg
Scott Douglass & McConnico
600 Congress Avenue, Suite 1500
Austin, TX 78701-2589

RE: Case Number 01-0203
Court of Appeals Number: 03-00-00354-CV
Trial Court Number: 9905725

Style: CAROLE KEETON RYLANDER, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, and JOHN CORNYN, ATTORNEY GENERAL OF THE STATE OF TEXAS
v.
THE DOW CHEMICAL COMPANY

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Tanya Hunter
Tanya R.Hunter, Deputy Clerk

cc: Ms. Diane O'Neal, Clerk
Ms. Amalia Rodriguez-Mendoza

CAUSE NO. 9905725

DOW CHEMICAL COMPANY	§	IN THE DISTRICT
	§	
V.	§	COURT OF TRAVIS COUNTY, TEXAS
	§	
CAROLE KEETON RYLANDER, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND JOHN CORNYN, ATTORNEY GENERAL OF THE STATE OF TEXAS	§	250TH JUDICIAL DISTRICT

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On April 6, 2000, the parties in the above captioned case appeared through their representatives and attorneys of record.

The Court, having heard the cross motions for summary judgment of Plaintiff Dow Chemical Company and Defendants Carole Keeton Rylander, Comptroller of Public Accounts of the State of Texas, and John Cornyn, Attorney General of the State of Texas (Comptroller) and having considered the pleadings and the arguments and authorities presented by counsel, concludes that the
Comptroller's motion for summary judgment should be granted and that Dow Chemical Company's motion for summary judgment should be denied.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Comptroller's motion for summary judgment be granted and that Dow's motion for summary judgment be denied.

IT IS FURTHER ORDERED that the State retain the tax at issue and that costs of court be adjusted against Dow Chemical Company.

This is the final judgment. All relief not granted is denied.

Signed this 13th day of April, 2000.

/s/ Mary Pearl Williams
Honorable Mary Pearl William
Judge Presiding

APPROVED AS TO FORM:

/s/ Ray Langenberg
Ray Langenberg
SCOTT, DOUGLASS &McCONNICO, L.L.P.
Attorneys for Plaintiff

/s/ William E. Storie
William E. Storie
Assistant Attorney General
Attorney General of Texas
Attorneys for Defendants

APPENDIX B

CAUSE NO. 9905725

DOW CHEMICAL COMPANY	§	IN THE DISTRICT
	§	
V.	§	COURT OF TRAVIS
	§	
CAROLE KEETON RYLANDER, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, and JOHN CORNYN, ATTORNEY GENERAL OF THE STATE OF TEXAS	§	COUNTY, TEXAS
	§	250TH JUDICIAL
	§	DISTRICT

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants Carole Keeton Rylander, Comptroller of Public Accounts of the State of Texas, and John Cornyn, Attorney General of the State of Texas (Comptroller) respectfully move for Summary Judgment against Dow Chemical Company (Dow) and would show as follows:

Basis for the Motion

1. For purposes of this Motion, there are no genuine issues of material fact and the Comptroller is entitled to judgment as a matter of law.

2. This Motion is based on the pleadings, the discovery responses of Dow attached to this motion, and the affidavit of Gary Johnson with Exhibits. Dow's attached discovery responses

are: (1) Response to Request for Admissions, (2) Answers to Interrogatories, (3) Starr Excess Insurance policy, and (4) Timber Insurance policy. Gary Johnson's affidavit is at Tab 5.

Grounds for the Motion

3. The Comptroller is entitled to summary judgment because the summary judgment proof shows that Dow and the insurance transactions at issue have sufficient nexus with Texas to justify a proportionate tax based on premiums paid by Dow covering its risks in Texas. The undisputed proof shows that Dow has a substantial presence in Texas. See Response to Request for Admissions. It shows further that the percentage allocation of risk and premiums to Dow's Texas property on which the tax is based were accurately computed by the Comptroller. See Response to Request for Admissions. The allocation of premiums based on the location of the risk or property insured is consistent with the gross premium reporting requirements of the National Association of Insurance Commissioners. See affidavit of Gary Johnson. Thus, the premiums-based tax assessed against Dow in this case would not be subject to tax elsewhere because the premiums are Texas premiums.

The excess liability policies on which the tax was based cover Texas risks and, logically, would be available to pay the damages of Texas citizens making claims against Dow for the risks and amounts insured against. In addition, the insureds in the policies include Dow's Texas employees acting within the scope of their employment. Dow's discovery responses show that the negotiating process in which the various coverages are obtained considers the properties and business to be covered. See Answers to Interrogatories and Timber policy.

Specifically, the insurers retain the right to inspect Dow's property at any time. This would necessarily include Dow's

property in Texas. Further, the insurers reserve the right to appeal adverse decisions against Dow that would invoke protection of the policies in the event that Dow and its primary insurer decided not to appeal. Dow's insurers also claim the contractual right, but not the obligation, to participate in litigation strategy and to require the cooperation of the insureds in handling a claim. These legal and contractual connections with Texas are sufficient to meet the due process test set forth in *Todd Shipyards. State Bd. Of Ins. v. Todd Shipyards Corp.*, 370 U.S. 45 1 (1962).

The independently procured insurance tax at issue in this case is a part of the State's overall regulatory protection of Texas insurers against the unauthorized practice of insurance and a protection of Texas revenues from loss of premium taxes that independent procurement of insurance might otherwise create. *See* TEX. INS. CODE art. 1.14-1 § 1. The code also defines a number of acts which constitute the doing of an insurance business in Texas. *Id.* at § 2. The statute further provides that the unauthorized insurance laws do not apply to "Transactions involving contracts of insurance independently procured through negotiations occurring entirely outside of this state which are reported and on which premium tax is paid in accordance with this Article." *Id.* at (b)4. Under current constitutional due process standards, the State of Texas has sufficient interest in these transactions to collect an insurance tax from Dow based on the premiums it pays to cover risks in Texas.

Even if Dow's insurance transactions do not have sufficient nexus with Texas to be taxable under the *Todd Shipyards* case, it is clear that *Todd Shipyards* itself has been superseded by later decisions of the United States Supreme Court. *See, e.g., Quill Corp. v. North Dakota*, 504 U.S. 298 (1996). In particular, there can be no question that Dow itself has substantial nexus with Texas and, in fact, has substantial physical presence and substantial assets and property in Texas.

Courts in other jurisdictions have concluded that *Todd Shipyards* has been superseded by other decisions of the United States Supreme Court, even where action is taken against the insurer. *Associated Electric & Gas Ins. Serv. Ltd. v. Clark*, 676 A.2d 1357 (R. I. 1996). Where the action taken is an assessment of tax against the insured in respect of its economic value in Texas, it should be even more clear that *Todd Shipyards* has no continuing vitality. The Rhode Island Supreme Court pointed out that *Todd Shipyards* has been superseded by the *Quill* case, which recognized that physical presence was not necessary to permit the State to reach a transaction between a foreign insurer and a resident insured. *Id.* at 1360-1361. Here, hundreds of millions of dollars in excess insurance coverage are provided not just to protect the Texas property of the insured, Dow and its employees, but realistically to protect the many Texas citizens and property owners who might potentially make claims against Dow in the event of a disastrous occurrence such as those provided for in the excess insurance coverages.

The McCarran-Ferguson Act expressly states that silence on the part of Congress shall not be construed to affect the State's regulation of insurance. 15 U.S.C. §§ 1011, 1012(a). The Court in *Todd Shipyards* stated, as it must, that in passing the McCarran-Ferguson Act Congress was not attempting to limit the applicability of the Court's decisions on constitutional due process. *Todd Shipyards*, 370 U.S. at 457. Although the *Todd Shipyards* Court cited legislative history of McCarran-Ferguson and its reference to three older decisions of the United States Supreme Court, it is current jurisprudence under the constitution which ought to control the State's ability to tax Dow on its insurance transactions covering property in Texas.

In many respects, taxation of the insured for the amount of premiums it pays for independently procured insurance is significantly similar to imposition of the use tax on purchases of

goods and services. In taxing the consumer of the insurance, the State does not purport to regulate the transaction or bind the foreign insurer any more than it attempts to regulate an interstate sale of services and goods by imposing a use tax on the Texas consumer. Here Dow, a resident of Texas which owns substantial property in Texas covered by the insurance, is the user of the insurance contract purchased by it to provide excess insurance coverage for losses in Texas. Constitutionally, the connection is more than sufficient between the item taxed and the State of Texas and its interests to justify the tax imposed.

CAUSE NO. 99-05725

DOW CHEMICAL COMPANY	§	IN THE DISTRICT
	§	
VS.	§	COURT OF TRAVIS
	§	
CAROLE KEETON RYLANDER, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, JOHN CORNYN, ATTORNEY GENERAL OF THE STATE OF TEXAS	§	COUNTY, TEXAS
	§	250TH JUDICIAL
	§	DISTRICT

PLAINTIFF'S RESPONSE TO DEFENDANTS' FIRST REQUESTS FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1:

Admit or deny that you did business in the state of Texas during the audit period.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 2:

Admit or deny that during the audit period, you had real and personal property within the state of Texas.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 3:

Admit or deny that if the independently procured insurance tax were assessable against you in this case, then the amount of tax calculated by the Comptroller is correct.

RESPONSE: Admit

CAUSE NO. 99-05725

DOW CHEMICAL COMPANY	§	IN THE DISTRICT
	§	
VS.	§	COURT OF TRAVIS
	§	
CAROLE KEETON RYLANDER, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND JOHN CORNYN, ATTORNEY GENERAL OF THE STATE OF TEXAS	§	COUNTY, TEXAS
	§	250TH JUDICIAL
	§	DISTRICT

PLAINTIFF'S RESPONSE TO DEFENDANTS' FIRST SET OF INTERROGATORIES TO PLAINTIFF

INTERROGATORY NO. 5:

Please describe in detail the process by which the policy was negotiated and purchased by Dow Chemical and identify all persons who participated in that process.

ANSWER:

See "A," "B," and "C," below for descriptions and identification.

A. Renewal Process for Excess Liability utilizing the Bermuda Insurance Market:

(A) As a rule, Dow's Liability Insurance policies have been written on an annual basis since 1976. To this end, Corporate Risk Management (CRM) analyzes Dow's

Liability exposure based on many items including, but not limited to:

- Sales
- Manufacturing Locations
- Dow Claims Experience and Development
- Current Litigation activity worldwide (both specific to and not specific to Dow)
- Employee Count
- Products manufactured
- Aircraft count
- Watercraft count
- Vehicle type and count
- Current Corporate Financial status

2. Discussions with Marsh (our insurance broker out of Detroit, with an office in Bermuda) are conducted on current Risk Management tools available to Dow, including but not limited to:

    - Insurance Coverages & Exclusions
    - Insurance Companies Analysis- financial stability, claims handling, etc.
    - Deductibles and other conditions

3. Strategy is developed for:

    - Coverages
    - Amount of limits
    - Carriers' potential to be on the Dow program based on Insurance Companies Analysis

4. Receive and complete each insurance carrier's Application for Insurance. Insurance carriers may have their own Insurance Application, or may use a "Bermuda Application". The

questions generally pertain to company operations, some of the exposure items as listed in 1 above and company loss experience.

5. Send completed Insurance Application to Marsh. Marsh forwards Insurance Application on to the insurance carrier.

6. Receive and respond to any additional questions from the insurance carriers. (Questions and responses are always forwarded through Marsh).

7. Travel to Bermuda to meet with insurance carrier's management and underwriting team to discuss:

    - Dow's current business strategy
    - Insurance carrier's current business strategy
    - Explanation of program structure desired by Dow based on insurance products available
    - Insurance market conditions
    - Coverages and limits available
    - Pricing
    - Any additional issues raised by either Dow or insurance carrier

8. Receive quotations from each of the insurance carriers through Marsh.

9 Evaluate the quotations:

    - Coverage
    - Pricing
    - Insurance carrier analysis

10. Make a decision on program structure - negotiating with companies, through Marsh, on coverage and pricing to secure

insurance. Communicate this information to Marsh, requesting binders of insurance from selected carriers.

11. Make payments based on instructions on insurance binders. Payment made through Marsh.

12. Receive insurance policies from insurance carriers, through Marsh.

The persons who participated in the above process were:

Paul D. Brink (The Dow Chemical Co., Director of Corporate Risk Management Dept. (1993-present), Suite 300, 1320 Waldo Avenue, Midland, MI 48642; phone (517) 636-0554);

Howard Burdett (Director of Corporate Risk Management (1991-1993), c/o Aluminum Company of America, 425 Sixth Avenue, Pittsburgh, PA 15219; phone (412) 553-4545)

John C. Gorte, The Dow Chemical Co., Manager of Liability Programs (1991-present), Corporate Risk Management Dept., Suite 300, 1320 Waldo Avenue, Midland, MI 48642; phone (517) 636-3202)

Gerald A. Heinz (Manager of Insurance (1991-1998); 5600 Evergreen; Midland, MI 48642; phone (517) 832-8966)

Linda S. Holder (The Dow Chemical Co., Assistant Manager of Liability Programs (1991-1994), Corporate Risk Management Dept., Suite 300, 1320 Waldo Avenue, Midland, MI 48642; phone (517) 636-4718)

Tracy T. Perry (The Dow Chemical Co., Assistant Manager of Liability Programs (1994-present), Corporate Risk Management Dept., Suite 300, 1320 Waldo Avenue, Midland, MI 48642; phone

(517) 636- 1109)

Robert D. Doyle Jr. (Marsh USA Inc., 600 Renaissance Center, Suite 2100 Detroit, MI 48243; phone (313) 393-6817)

Joy A. Stockmaster (Marsh USA Inc., 600 Renaissance Center, Suite 2100, Detroit, MI 48243; phone (313) 393-6760))

Kathryn Winter (Marsh Global Broking (Bermuda) Ltd., Craig Appin House, 8 Wesley Street, Hamilton HM JX, Bermuda; phone (441) 295-3454)

Richard N. Peters (c/o RNP Corporation, 1360 Woodbridge, St. Clair Shores, MI 48080; phone (810) 775-5067)

David Holmes, Vice President, Marsh Global Broking (Bermuda) Ltd., Craig Appin House, 8 Wesley Street, Hamilton HM JX, Bermuda; phone (441) 295-3454)

B. Dorintal and Timber Excess & Pollution:
Renewal Process for Excess Liability utilizing the Bermuda Insurance Market:

1. Dow's Liability Insurance policies with their insurance subsidiaries have been written on an annual basis since 1977. To this end, Corporate Risk Management (CRM) analyzes Dow's Liability exposure based on many items including, but not limited to:

- Sales
- Manufacturing Locations
- Dow Claims Experience and Development
- Chemical Industry Claims Experience and Development
- Current Litigation activity worldwide (both specific to

and not specific to Dow)

- Employee Count
- Products manufactured
- Aircraft count
- Watercraft count
- Vehicle type and count
- Current Corporate Financial status

2. CRM reviews available products from non-Dow commercial insurance carriers including but not limited to:

    - Insurance Coverages & Exclusions
    - Insurance Companies Analysis- financial stability, claims handling, etc.
    - Deductibles and other conditions

3. Strategy is developed for desired insurance coverages and limits. CRM analyzes the products available from non-Dow commercial insurance carriers, compares these to the desired insurance coverage and determines areas for negotiating coverage with Dorintal and Timber.

4. Provide Dorintal or Timber with exposure information as requested. Much of this information is similar to what is listed in item 1.

5. Receive and respond to any additional questions from Dorintal or Timber.

6. Meet with Dorintal or Timber in Midland, Michigan, with insurance underwriting team to discuss:

    - Dow's current business strategy
    - Timber or Dorintal current business strategy
    - Explanation of program structure desired by DOW

based on insurance products available

- Insurance market conditions
- Coverages and limits available
- Pricing
- Any additional issues raised by either Dow or Timber/Dorintal

7. Receive quotations

8. Evaluate the quotations:

    - Coverage
    - Pricing

9 Make a decision on program structure - negotiating with Timber or Dorintal on coverage and pricing to secure insurance.

10. Make payments based on instructions on insurance binders.

The persons who participated in the above process were:

Paul D. Brink (The Dow Chemical Co., Director of Corporate Risk Management Dept. (1993-present), Suite 300, 1320 Waldo Avenue, Midland, MI 48642; phone (517) 636-0554)

Howard Burdett (Director of Corporate Risk Management (1991-1993), c/o Aluminum Company of America, 425 Sixth Avenue, Pittsburgh, PA 15219; phone (412) 553-4545)

John C. Gorte, The Dow Chemical Co., Manager of Liability Programs (1991-present), Corporate Risk Management Dept., Suite 300, 1320 Waldo Avenue, Midland, MI 48642; phone (517) 636-3202)

Gerald A. Heinz (Manager of Insurance (1991-1998); 5600

Evergreen; Midland, MI 48642; phone (517) 832-8966)

Linda S. Holder (The Dow Chemical Co., Assistant Manager of Liability Programs (1991-1994), Corporate Risk Management Dept., Suite 300, 1320 Waldo Avenue, Midland, MI 48642; phone (517) 636-4718)

Tracy T. Perry (The Dow Chemical Co., Assistant Manager of Liability Programs (1994-present), Corporate Risk Management Dept., Suite 300, 1320 Waldo Avenue, Midland, MI 48642; phone (517) 636-1109)

C. Dow Property Insurance Procurement - Dow and Timber

In 1993-94 and 1994-95 Timber wrote property policies directly with The Dow Chemical Company for coverage of portions of the Global Property Insurance Program.

The process for procurement of this insurance was as follows:

1. Dow's Corporate Risk Management Department (CRM) along with the Property Insurance broker (Sedgwick, located in Boston, MA) would analyze the various property risk exposures. These exposures would include:

    11. List of asset locations.
    12. Property insurable values.
    13. Inventory insurable values.
    14. Business Interruption insurable values.
    15. Property Loss statistics.
    16. Maximum Loss evaluation studies. (PML -Probable Maximum Loss studies)

2. CRM along with the broker evaluates the available insurance market for products. This includes the Dow and non-Dow

insurance markets. Some of the information evaluated includes:

17. Insurance limits and coverages

18. Insurance company security

3. CRM along with the broker develops an overall strategy as to the design of the Global Property Insurance Program.

4. Information packages are developed by Dow and the broker (Property Insurance submissions). This information would include the type of exposure information listed in number 1 above as well as additional information if desired or requested. This information is sent to the Dow and non-Dow insurance markets.

5. Receive and respond to any additional questions from the Dow or non-Dow insurance markets.

6. Meet with Timber in Midland, Michigan, with the insurance underwriting team to discuss:

   - Dow's current business strategy
   - Timber's current business strategy
   - Review and explanation of the submission package including the proposed Global Property Insurance Program structure.
   - Insurance market conditions
   - Coverages and limits
   - Pricing

7. Receive quotations

8. Evaluate quotations based on

- Terms
- Pricing

9. Negotiate coverage and pricing with Timber.

10. Bind coverage.

11. Make premium payments based on insurance binder terms.

The persons who participated in the above process were:

Gerald A. Heinz (Manager of Insurance (1991-1998); 5600 Evergreen; Midland, MI 48642; phone (517) 832-8966))

Harrison Plum, Jr. (Manager of Property Programs (1991-1997), Corporate Risk Management Dept., 704 Wilson Drive, Midland, MI 48642; phone (517) 835-8044)

Al Blankenship (c/o Marsh, Inc., Global Services, Sedgwick Global Property Dept., 200 Clarendon Street, Boston, MA 02116; phone (617) 421-0286)

Thomas Stewart (c/o Marsh, Inc., Global Services, Sedgwick Global Property Dept., 200 Clarendon Street, Boston, MA 02116; phone (617) 421-0286)

Diane Gould (c/o Marsh, Inc., Global Services, Sedgwick Global Property Dept., 200 Clarendon Street, Boston, MA 02116; phone (617) 421-0286)

STARR EXCESS
Liability Insurance Company, Ltd.
29 Richmond Road, Pembroke HM08, Hamilton, Bermuda

DECLARATIONS-attaching to and forming part of Policy No. 200806

Item 1	(a) **Named Insured:**	The Dow Chemical Company
	(b) Address:	2030 Dow Center Midland, Michigan 48674, USA
Item 2	**Limits of Liability:**	
	(a) Per **Occurrence**	$100,000,000
	(b) Annual **Aggregate**	$100,000,000
Item 3	**Retention:**	
	Per **Occurrence**	$250,000,000
Item 4	**Inception Date:**	February 28, 1995
	at 12:01 A.M. at the address of the Named Insured listed in Item 1(b) above.	
Item 5	**Retroactive Coverage Date**:	December 1, 1993
Item 6	**Representative of Named Insured:**	~~Bowring (Bermuda) Ltd~~
Item 7	**Currency:**	
	(a) Premium:	US$
	(b) Claims:	US$
Item 8	**Premium:**	$453,600

STARR EXCESS
Liability Insurance Company, Ltd.

Item 9 **The Company:**

(a) All Notices of Occurrence or Claim: Claims Dept.

(b) All other Notices: Underwriting Department, President, Starr Excess

Item 10 **Application Date**: November 17, 1994 with Schedules A and C. September 25, 1995, Schedule B.

Item 11 **Policy Form:** SELIC IO-01 amended to provide No Batch Coverage.

Endorsements: 1-7

/s/ Jarol W. Mitchell (?)
Authorized Representative

Date of Issuance - November 6, 1995

STARR EXCESS
Liability Insurance Company, Ltd.

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NOTICE: **THIS TABLE OF CONTENTS IS FOR REFERENCE PURPOSES ONLY. IT IS NOT PART OF THE TERMS, CONDITIONS OR EXCLUSIONS OF THIS POLICY, AND IS NOT INTENDED TO AFFECT THE MEANING OF SUCH TERMS, CONDITIONS OR EXCLUSIONS.**

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STARR EXCESS
Liability Insurance Company, Ltd.

THIS IS A STAND-ALONE LIABILITY POLICY WHICH IS NOT SUBJECT TO THE TERMS AND CONDITIONS OF ANY OTHER INSURANCE AND CONTAINS PROVISIONS WHICH AY BE DIFFERENT FROM THOSE OF ANY OTHER INSURANCE. IT SHOULD BE READ CAREFULLY BY THE INSURED

COVERAGE APPLIES, SUBJECT TO THE TERMS, CONDITIONS AND EXCLUSIONS OF THE POLICY. ONLY IF NOTICE OF OCCURRENCE OR OF A CLAIM ARISING THEREFROM IS GIVEN DURING THE POLICY PERIOD OR IF PURCHASED, THE DISCOVERY PERIOD. THE DATE SUCH NOTICE IS GIVEN IS THE DATE FOR DETERMINATION OF THE APPLICABLE LIMITS, RETENTIONS, TERMS, CONDITIONS AND EXCLUSIONS OF THE POLICY.

THE COMPANY DOES NOT HAVE ANY DUTY TO DEFEND, DEFENSE COSTS COVERED BY THE POLICY ARE INCLUDED WITHIN AND ARE NOT IN ADDITION TO THE LIMITS OF LIABILITY OF THIS POLICY.

STARR EXCESS
Liability Insurance Company, Ltd.

In consideration of the payment of the premium set forth in Item 8 of the Declarations and in reliance upon the statements in the Application and Schedules referred to in Item 10 of the Declarations and any Renewal applications(s) and any supplementary information pertaining to any such application, which are hereby incorporated by reference as if physically attached to this Policy, the Company agrees as follows:

INSURING AGREEMENTS

I COVERAGE

To indemnify **the Insured** for **Ultimate Net Loss** the **Insured** becomes obligated to pay by reason of liability:

(a) imposed by law, or
(b) assumed by **the Insured** under contract or agreement prior to the commencement of the **Occurrence** giving rise to such liability,

for **Damages** on account of:

(i) **Personal Injury**
(ii) **Property Damage**
(iii) **Advertising Liability**

caused by an **Occurrence**; provided,

COVERAGE A: Notice of the **Occurrence**, or of a **Claim** arising therefrom, shall have been given by **the Insured** during the **Policy Period** in accordance with Section V of this Policy, or

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Liability Insurance Company, Ltd.

COVERAGE B: Notice of the **Occurrence**, or of a **Claim** arising therefrom shall have been given during the **Discovery Period** in accordance with Section V of this Policy, but only if the **Discovery Period** option has been elected in accordance with the provisions of this Policy.

II LIMITS OF LIABILITY

A. Regardless of the number of **Insureds** under this Policy, the Company shall be liable only for that amount of **Ultimate Net Loss** for each **Occurrence** covered under this Policy, other than an **Industrial Aid Aircraft Occurrence**, which is in excess of the greater of:

(1) The amounts indicated as the limits of the underlying insurances listed on the present or any prior Schedule B annexed to this Policy and any other underlying insurance, irrespective of whether the limits of such underlying insurances are available or collectible; or

(2) The per **Occurrence** Retention amount listed in Item 3 of the Declarations,

and then only up to per **Occurrence** limit of liability stated in Item 2(a) of the Declarations for each **Occurrence** covered hereunder, and further subject to the aggregate limits of liability stated in Item 2(b) of the Declarations for all **Occurrences** covered in each **Annual Period**.

B. Subject to Exclusions P and Q, all **Personal Injury** or **Property Damage** arising from an **Integrated Occurrence** shall be added together and treated as one **Occurrence**, irrespective of

the number of persons injured or properties damaged.

The applicable underlying limits, retention, limits of liability and terms and conditions of the policy applicable to such **Personal Injury** or **Property Damage** shall be determined under the policy in effect on the date the Company receives **Notice of Integrated Occurrence**.

Subject to Exclusion Q, if notice of an **Occurrence** has been given during a prior **Annual Period**, and such **Occurrence** is included in the **Notice of Integrated Occurrence** given during a subsequent **Annual Period**, all **Ultimate Net Loss** arising from such **Occurrence** shall be included in the **Ultimate Net Loss** arising from the **Integrated Occurrence**. Any payments of **Ultimate Net Loss** on account of such earlier notified **Occurrence** shall be deemed to have been made under the **Annual Period** in which the **Company** received **Notice of Integrated Occurrence**. Appropriate adjustments shall be made to the applicable limits of liability in the respective **Annual Periods** of this Policy to reflect such transfer of **Ultimate Net Loss** payments from the prior **Annual Period** to the **Annual Period** in which **Notice of Integrated Occurrence** was given.

C. Subject to the limits of liability stated in Item (2)(a) and (b) of the Declarations, and regardless of the number of **Insureds** under this Policy, the **Company** shall be liable only for that amount of **Ultimate Net Loss** for each **Occurrence** arising out of **Industrial Aid Aircraft Use** which is in excess of the greater of:

(1) The per **Occurrence** Retention amount stated in Item 3 of the Declarations; or
(2) One Hundred Million Dollars ($100,000,000.00).

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D. The limits of liability of any underlying insurances, the retention stated in Item 3 of the Declarations, and the amount stated in Paragraph C of this Section II shall be reduced or exhausted solely by the actual payment of **Claims** covered under this Policy. This Policy shall not be subject to or follow the form of any underlying insurances, but shall apply in accordance with its own terms, conditions and exclusions.

E. (1) With respect to any liability of an **Insured** which arises in any manner whatsoever out of operations or the existence of any **Joint Venture** in which such **Insured** has an interest, the liability of the **Company** under this Policy shall be limited to **the Insured's** liability arising out of such **Joint Venture**.

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(ii) Infringement of registered trademarks, service marks or trade name by use thereof, but this exclusion shall not apply to titles or slogans;

(iii) The failure of goods, products or services to conform with advertised quality or performance;

(iv) The wrong description of the price of goods, products or services;

(v) An offense committed by an **Insured** whose business is advertising, broadcasting, publishing or telecasting.

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Liability Insurance Company, Ltd.

IV CONDITIONS

A. PREMIUM

The premium for this Policy is a flat premium and is not subject to adjustment. The premium shall be paid to the **Company**.

B. INSPECTION

The **Company** shall be permitted but not obligated to inspect **the Insured's** property and operations at any time. Neither the **Company's** right to make inspections nor the making thereof or of a report thereon shall constitute an undertaking on behalf of or for the benefit of **the Insured** or others to determine or warrant that such property or operations are safe or are in compliance with any statute, law, ordinance, rule or regulation.

C. CROSS LIABILITY

In the event of a **Claim** made by reason of **Personal Injury** sustained by an employee of one **Insured** hereunder for which another **Insured** hereunder is or may be liable, this Policy shall cover such Insured against whom **a Claim** is made in the same manner as if separate **policies** had been issued to each **Insured** hereunder.

Except with respect to Exclusion D, in the event of any **Claims** made by **reason** of **Property Damage** to the property of one **Insured** hereunder for which another **Insured** hereunder is liable, this Policy shall cover such **Insured** against whom **a Claim** is made in the same manner as if separate policies had been issued

to each **Insured** hereunder.

Nothing contained herein shall operate to increase the **Company's** limits of liability **as set** forth in Item 2 of the Declarations.

D. ASSISTANCE AND COOPERATION

(1) The **Company** shall not be called upon to assume charge of the settlement or defense of any **Claim** made or suit brought or proceeding instituted against an **Insured**, but the **Company** shall have the right and shall be given the opportunity to associate with the **Insured** or the **Insured's** underlying insurers or both in the defense and control of any **Claim**, suit or proceeding relative to any occurrence where the **Claim** or suit involves, or appears reasonably likely to involve, the **Company**, in which event **the Insured** and the **Company** shall cooperate in all things in the defense of such **Claim**, suit or proceeding.

(2) **The Insured** shall furnish promptly all information reasonably requested by the **Company** with respect to any **Occurrence**, both with respect to any **Claim**, suit or proceeding against the **Insured** and pertaining to coverage under this Policy.

(3) Those expenses incurred by the **Company** on its own behalf in connection with claims representation pursuant to this Condition D (1) shall be at its own expense and shall not be part of **Ultimate Net Loss**.

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E. APPEALS

In the event **the Insured** or **the Insured's** underlying insurers elect not to appeal a judgment in excess of the retention or the underlying limits, as the case may be, the **Company** may elect to make such appeal at its own cost and expense and shall be liable for the taxable costs and disbursements of such appeal and post-judgment interest on the judgment appealed from accruing during such an appeal. In no event, however, shall liability of the **Company** for **Ultimate Net Loss** exceed the applicable limit of liability set forth in Item 2 of the Declarations plus the costs and expenses of such appeal.

F. LOSS PAYABLE

Liability under this Policy with respect to any **Occurrence** shall not attach unless and until:

(1) **the Insured's** underlying insurer(s) or **the Insured** shall have paid the greater of the amount of any underlying limits or the applicable retention set forth in Item 3 of the Declarations; and

(2) **the Insured's** liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by settlement approved in writing by the **Company**.

The Insured shall make a definite demand for payment for any amount of the **Ultimate Net Loss** for which the **Company** may be liable under this Policy within twelve (12) months after **the Insured** shall have paid such amount. If any

subsequent payments shall be made by **the Insured** on account of the same **Occurrence** or **Claim**, additional demands for payment shall be made similarly from time to time. Such losses shall be due and payable by the **Company** within thirty (30) days after they are respectively demanded and proven in conformity with this Policy. If judgment is rendered, settlement is denominated or another element of **Damages** is stated in a currency other than the applicable currency under Condition L below, payment under this Policy shall be made in

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defenses under this Policy and any other defenses, other than jurisdiction defenses, as it would have been entitled to raise in the action or proceeding with such insurers.

N. CONSENT TO JURISDICTION

Solely for the purpose of effectuating the foregoing arbitration provision, including the enforcement of any award entered in such arbitration, the **Company** agrees as follows:

(1) the **Company**, at the request of **the Insured**, will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this clause constitutes or should be understood to constitute a waiver of the **Company's** rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a

transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States. It is further agreed that service of process in such suit may be made upon the party named in Item 9(b) of the Declarations and that in any suit instituted against it upon this Policy, the **Company** will abide by the final decision of such Court or of any Appellate Court in the event of an appeal;

(2) The party named in Item 9(b) of the Declarations is authorized and directed to accept service of process on behalf of the **Company** in any such suit and/or upon the request of the **Insured** to give a written undertaking to the **Insured** that such party will enter a general appearance upon the **Company's** behalf in the event such a suit shall be instituted.

(3) Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefore, the **Company** hereby designates the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as its true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of **the Insured** or any beneficiary hereunder arising out of this Policy, and hereby designates the party named in Item 9(b) of the Declarations as the person to whom the said officer is authorized to mail such process or a true copy thereof;

(4) Other than as set forth in this Condition N, the party in Item 9(b) of the Declarations shall have no authority to act for or bind the **Company**.

O. GOVERNING LAW AND INTERPRETATION

(1) This Policy shall be governed by and construed in accordance with the substantive laws of the State of New York, except insofar as such laws:

(a) may prohibit payment in respect of punitive damages covered hereunder;

(b) pertain to regulation by the Insurance Department of the State of New York of insurers doing insurance business or of issuance or delivery of policies of insurance within the State of New York; or

(c) are inconsistent with any express provision of this Policy.

(2) The terms, conditions and exclusions of this Policy are to be construed in an evenhanded fashion as between **the Insured** and the **Company**. Without limitation, where the language of this Policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant terms, conditions and exclusions of the Policy, without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favor of either **the Insured** or the **Company** and without reference to parol or other extrinsic evidence.

STARR EXCESS
Liability Insurance Company, Ltd.

P. LIABILITY OF THE COMPANY

The **Named Insured** and **the Insured** agree that the liability and obligations of the **Company** hereunder shall be satisfied from the funds of the **Company** alone and that the individual shareholders of the **Company** shall have no liability hereunder to the **Named Insured** or **the Insured**.

Q. POLICY EXTENSION

Subject to Condition K(2), Coverage A of this Policy may be extended at the expiration of each **Annual Period** for another **Annual Period**, subject only to agreement between the Company and the **Named Insured** as to the applicable premium and such other terms and conditions as the **Company** and the **Named Insured** may mutually deem appropriate.

R. REINSTATEMENT

(a) At the time of each annual policy extension of Coverage A, the aggregate limit of liability set forth in Item 2(b) of the Declarations shall, unless otherwise agreed by the **Named Insured** and the **Company**, automatically be reinstated with respect to covered **Occurrences** of which notice is first given during the following **Annual Period**. There shall be no separate premium charged for this automatic reinstatement in addition to that provided for in Condition Q. above.

(b) If during any **Annual Period** the aggregate limit of liability set forth in Item 2(b) ("Original **Aggregate** Limit") of the Declarations is or may be impaired by virtue of **Occurrence(s)** of which notice has been given previously during such **Annual**

Period, then the **Named Insured** shall be entitled to one reinstatement of all or any portion of such aggregate limit, based on the following terms and conditions:

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U. NOTICE

All notices under any provision of this Policy shall be in writing and given by prepaid express courier, airmail, telex or telecopier properly addressed to the appropriate party. Notice to any **Insured** may be given to the **Named Insured** at the address shown in Item 1(b) of the Declarations or to such other person as the **Named Insured** shall designate in Item 6 of the Declarations. Notice to the **Company** shall be given to the party indicated in Item 9(a) or (b), as applicable, of the Declarations. Notice given as above shall be deemed received only upon actual receipt by the respective party designated in the Declarations.

V. SUBROGATION

In the event of any payment hereunder, the **Company** shall be entitled to exercise rights of subrogation and **the Insured** shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. In such case, the **Company** will act in concert with all other interested parties, including **the Insured**, concerned in the exercise of rights of recovery. The apportioning of any amounts which may be so recovered shall follow the principle that any parties, including **the Insured**, that shall have paid an amount over and above any payment hereunder shall first be reimbursed up to the amount paid by them. The

company is then to be reimbursed out of any balance then remaining up to the amount paid by it; lastly, the parties of whose interests this coverage is in excess, including **the Insured**, are entitled to claim the residue, if any. Expenses incurred in obtaining recoveries shall be apportioned among the interests sharing in such recovery in accordance with each such interest's proportionate share of the recovery.

W. HEADINGS

The descriptions in the headings and sub-headings of this Policy are inserted solely for convenience and do not constitute any part of the terms or conditions hereof.

V NOTICE OF OCCURRENCE AND/OR CLAIM

A. MANDATORY NOTICE

If a manager or equivalent-level employee of the Risk Management, Insurance or Law Department or any executive officer of the **Named Insured**, shall become aware of an **Occurrence** or **Claim** likely to involve this Policy, the **Named Insured** shall, as a condition precedent to the rights of any **Insured** under this Policy, give written notice thereof to the **Company** providing the information and documents specified in Paragraph C of this Section V.

Such notice must be given as soon as practicable and, in any event, during the **Policy Period** or the **Discovery Period**, if applicable, or in accordance with Paragraph 2(b) of Exclusion J, if applicable. Failure to provide written notice as prescribed above

shall result in a forfeiture of any rights to coverage hereunder in respect of such **Occurrence** or **Claim**.

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F. **Claim** means an oral or written demand against an **Insured** for **Damages** covered by this Policy, and includes the threat initiation of any suit or arbitration proceeding or a request for a tolling agreement.

G. **Damages** means all forms of compensatory damages, monetary damages and statutory damages; punitive or exemplary damages and costs of compliance with equitable relief, other than governmental or criminal fines or penalties, which **the Insured** shall be obligated to pay by reason of judgment or settlement for liability on account of **Personal Injury**, **Property Damage** and **Advertising Liability**, and shall include **Defense Costs**.

H. **Defense Costs** means reasonable and necessary legal costs and other expenses incurred by or on behalf of **the Insured** in connection with the defense of any **Claim**, including attorneys' fees and disbursements, law costs, premiums on attachment or appeal bonds, post-judgment interest, expenses for experts and for investigation, adjustment, appraisal and settlement, excluding the salaries, wages and benefits of **the Insured's** employees and **the Insured's** administrative expenses.

I. **Discharge** means discharge, dispersal, release or escape.

J. **Discovery Period** means the twelve (12) month period, commencing upon the **Termination Date** of Coverage A of this

Policy, and ending on the expiration of the last **Annual Period** for which Coverage B is elected as provided in Condition S hereof.

K. **General Liability Hazard** means liability not encompassed by the **Products and Completed Operations Hazard**.

L. **Hazard** means the **Products and Completed Operations Liability Hazard** or **General Liability Hazard**, as the case may be.

M. **Inception Date** means the Inception Date set forth in Item 4 of the Declarations; provided, however, that with respect to any **Insured** which becomes an **Insured** subsequent to the Inception Date, the Inception Date for that **Insured** shall be the date such person or entity became an **Insured** under this Policy, or such other date as may be agreed in writing between the **Named Insured** and the **Company**.

N. **Incidental Watercraft Use** means use by **the Insured** or any owned, leased or chartered **Watercraft** less than 75 feet in length but shall not include:

(1) use of **Watercraft** for the commercial carriage for a fee of passengers or cargo for parties other than **the Insured**;

(2) use of **Watercraft** in connection with the commercial provision of marine services to others for a fee;

(3) use of any **Watercraft** held in inventory or otherwise for lease or charter to another person by an **Insured** in the business of lease or charter of **Watercraft**; or

(4) use of **Watercraft** owned by a party other than **the Insured** which is being serviced, maintained, fueled, or tested or otherwise is in the temporary care, custody or control of **the Insured** in connection with any business operations of **the Insured** relating to **Watercraft** servicing, maintenance, fueling, testing, storage or associated or similar matters.

O. Industrial Aid Aircraft Use means use by **the Insured** of any owned, non-owned, leased or chartered **Aircraft** principallyfor the transportation of officers, employees and invited guests of **the Insured**, and having a seating capacity, exclusive of cockpit crew but inclusive of cabin crew, of no more than 20 persons, but shall not include (i) use of any **Aircraft** for commercial airline operations; (ii) use of any **Aircraft** held in inventory or otherwise for sale, lease, charter or delivery to another person by an **Insured** in the business of manufacture, sale, lease or charger of Aircraft; (iii) use of **Aircraft** for product testing or demonstration purposes; (iv) use of **Aircraft** owned by a party other than **the Insured** which is being serviced, maintained, fueled or tested or otherwise is in the temporary care, custody or control of **the Insured** in connection with any business operations of **the Insured** relating to **Aircraft** servicing, maintenance, fueling, testing, storage or associated or similar matters; or, (v) use of any **Aircraft** giving rise to liability of **the Insured** within the **Products and Completed Operations Hazard**.

P. the Insured means, except as specifically stated otherwise in this Policy, all **Insureds** as defined below:

(1) the **Named Insured** and, if the **Named Insured** is

designated in Item 1(a) of the Declarations as a partnership or **Joint Venture**, the partnership or **Joint Venture** so designated and each partner or member thereof but only with respect to his or its liability as such;

(2) (a) any subsidiary or affiliate of the **Named Insured** for any **Annual period** whose accounts as of the date of the financial statements of the **Named Insured** submitted to the **Company** most recently prior to the rating of the premium for such **Annual Period** (i) are consolidated in accordance with generally accepted accounting principles in the United States of America; (ii) in the case of any foreign **Named Insured**, any subsidiary or affiliate whose accounts would be consolidated in the financial statements of such **Named Insured** if such accounts would have been consolidated in accordance with generally accepted accounting principles in the United States of America; or (iii) were eligible for such consolidation and whose financial statements were submitted to the **Company** with such financial statements of the **Named Insured** as of such date;

(b) any subsidiary, affiliate or associated company of the **Named Insured** listed on Schedule A hereto;

(3) any present or former officer, director, stockholder or employee of any person or entity named in paragraph (1) or (2) above or (6) below, but only while acting within the scope of his duties as such, and any person or organization with respect to liability for providing real estate

management for any such person or entity named in paragraph (1) or (2) above or (6) below;

(4) any person, organization, trustee estate to whom any person or entity named in paragraph (1) or (2) above or (6) below is obligated by virtue of a written contract or agreement provide insurance such as is afforded by this Policy, but only to the extent of such obligation and only in respect of operations (other than commercial insurance operations) by or on behalf of such person or entity named in paragraph (1) or (2) above or (6) below or of facilities owned or used by such person or entity named in paragraph (1) or (2) above or (6) below;

(5) with respect to any **Automobile** owned by any person or entity named in paragraph (1), (2) or (3) above or (6) below or hired for use on behalf of any such person or entity, any person or organization legally responsible for the use thereof, provided the actual use of the **Automobile** is with the permission of such person or entity;

(6) any **Joint Venture** in which **the Insured** has an interest, but only if:

(a) **the Insured** has sole responsibility for the **Joint Venture**; or

(b) **the Insured** is obligated to provide insurance for the **Joint Venture** in its entirety such as is afforded by this Policy;

(7) It is agreed automatically to include as an **Insured** without

adjustment of premium under this Policy for any **Annual Period** any entity acquired or formed by or merged with an Insured (a "Potential Additional Insured") during such **Annual Period** provided that:

(a) the fair value of the sum of all cash, securities, assumed indebtedness and other consideration expended by all **Insureds** for any such acquisition, formation, or merger or any series of interrelated acquisitions, formations or mergers to not exceed 5% of the total annual gross revenues of the **Named Insured** and its consolidated subsidiaries and affiliates as most recently reported to the **Company** for rating purposes prior to such **Annual Period**;

(b) the incremental annual gross revenues attributable to such acquisition, formation or merger or any series of interrelated acquisitions, formations or mergers do not exceed 5% of the total annual gross revenues of the **Named**

THE DOW CHEMICAL COMPANY

SCHEDULE OF UNDERLYING INSURANCES WITH LIMITS IN EXCESS OF $100,000,000

	Coverage	Policy Period	Limits	Carrier/Participation	Premium
1.	Aircraft Liability	6-1-94 to 6-1-95	$200,000,000 Each Occurrence Exclusive of Allocated Expenses	U.S.A.I.G./100%	$295,000
2.	Marine Owned/Bareboat	2-20-94 to 2-20-95	Unlimited Except for Pollution - $500,000,00 This P&I does not apply to the Service Agreement with Dixie Carries	The American Club/ 100%	$114,237
	Time Chartered Units	2-20-94 to 2-20-95	$50,000,000 Excess of Owners Limitation Subject To Overall Limitation of $500,000,000 Each Accident	The American Club/ 100%	$232,440
	Difference in Conditions	2-20-94 to 2-20-95	$200,000,00 Each Occurrence Inclusive of Allocated Expenses Expenses Excess of $5,500,000	London Insurance Companies and Lloyd's Underwriters/100%	$391,500
3.	Aviation Products	1-23-94 to 1-23-95	$300,000,000 Each Occurrence/ Aggregate including $100,000,00 Grounding Liability	U.S.A.U/A.A.U/100%	$259,470

4.	Excess Casualty	12-1-94 to 12-1-95 Retroactive Date 1-1-86	$50,000,000/$50,000,000 Occurrence/Annual Aggregate Inclusive allocated Expenses Excess of $50,000,000	X.L. Insurnace Company Ltd./ 100%	$1,600,00
5.	Excess Casualty	12-1-94 to 12-1-95 Retroactive Date	$150,000,000/$150,000,000 Occurrence/Annual Aggregate Inclusive Allocated Expenses Excess of $100,000,00	ACE Insurance Company, Ltd/100%	$2,665,000
6.	Excess Casualty	2-28-95 to 12-1-95 Retroactive Date 12-1-93	$100,000,000/$100,000,000 Occurrence/Annual Aggregate Inclusive allocated Expenses Excess of $250,000,000	Star Excess Liability Insurance Company, Ltd./100%	$600,00 - Annual $453,600 - Pro Rata
7.	Excess Casualty	2-1-94 to 12-1-95 Retroactive Date 12-1-93	$50,000,000/$50,000,000 Occurrence/Annual Aggregate Inclusive allocated Expenses Excess of $250,000,000 and $350,000,000 effective 2-28-95	ACE Insurance Company Ltd/100%	Included in (5) above

Date: 9/25/95

TIMBER INSURANCE LIMITED

P. O. BOX HM 1022 • 12 PAR-LA-VILLE ROAD
•HAMILTON HM08 • BERMUDA
Telephone (809-29) 2-3434 Telex 3561 WES A BA

POLICY NO. DD0068638

ALL RISK

DOES insure the Insured, named in the declaration below, in consideration of the payment of the payment of the premium, for a loss or damage which occurs during the policy term stated in the Declarations, and in reliance upon the statements in the Declarations and subject to all terms of the policy.

DECLARATIONS:

Named Insured:	The Dow Chemical Company Midland, MI 48674
Limit:	$25,000,000 Combined Property Damage and Business Interruption
Term:	Three (3) Years from December 1, 1993
Premium:	$7,000,000
Coverage:	All Physical Loss as Defined in Attached Forms
Deductible:	Various (See Clause 11 and Endorsement 3)

INSURING AGREEMENT

The insurance afforded shall be as stated in the Coverage Endorsement (s) issued to form a part of this policy, subject to the statements in and all the terms of the Declarations applicable thereto, and to the exclusions, conditions and all other terms of this policy.

/s/ Philip M. Roels
AUTHORIZED SIGNATURE

Executed this 26th day of April, 1994.

1. **INSURED**: The Dow Chemical Company and any owned, controlled, or subsidiary companies or corporations, as now or may hereafter be constituted, in which The Dow Chemical Company owns 60 % or more of the combined voting power. However, there is no coverage for the Destic Partnerships as listed on Endorsement No. 1, Attachment A.

2. **LOSS PAYABLE**: Loss or damage, if any, hereunder shall be adjusted and make payable to The Dow Chemical Company or order.

3. **LIMIT OF RECOVERY**: This Company shall not be liable under this policy for more than $25,000,000, for loss or damage arising from one occurrence regardless of the number of locations or perils involved, nor shall liability exceed any specific sublimit applying to any insured loss. Coverage or location as stated below.

   C. $15,000,000 Boiler and Machinery

   ALL LIMITS ARE INCLUSIVE OF DEDUCTIBLES.

4. **POLICY TERM**: From 12:01 a.m. Standard Time, December 1, 1993, at location of the property insured to 12:01 a.m. Standard Time, December 1, 1996.

5. **PREMIUM**: The premium for the furst year beginning December 1, 1993 shall be $7,000,000. The premium for subsequent years to be negotiated.

6. **PROPERTY INSURED AND REPORTS OF VALUES**: This policy covers property of every description and business interruption, rental value, and extra expense as further defined herein. Property of every description includes property owned by or under the control of the Insured, for which the Insured

may be legally liable, has agreed to insure or has an insurable interest including property while in th course of construction, erection and/or installation while in the possession of contractors or others. Coverage also applies to personal property of officers, employees and guests of the Insured while on premisses of the insured. Coverage also applies to property owned by others, but in the actual constructive custody of the Insured.

This policy also covers improvements and betterments introduced by the Insured to buildings not owned by the Insured, and it is understood and agreed that for loss adjustment purposes in the event of loss or damage to such improvements and betterments, the Insured shall be considered as sole and unconditional owner of such improvements and betterments, any contract or lease to the contrary notwithstanding.

The insured shall report to the Company, once per year, all values which are then known to the insured to be covered by this contract

7. **PROPERTY EXCLUDED**:

A. Currency, money, notes, securities, deeds, growing crops, standing timber, animals (except research).

D. Property while covered under import or export ocean marine policies;

E. Watercraft while waterborne; assembled aircraft, but not excluding re removable contents, flight test or other equipment not part of the permanent design; motor vehicles licensed for highway use when not on the Insured's premises;

8. **PERILS INSURED**: Except as hereinafter excluded, this policy insures against all direct physical loss of , or damage to the insured property as well as loss resulting from the necessary interruption of business and/or extra expense.

9. **PERILS EXCLUDED**: This policy does not insure against loss or damage:

   A. Loss of currency, money, notes, securities, and deeds caused by dishonesty of Insured's employees.

   B. Due to delay or loss of markets, penalty for non-completion of contract, or compliance with contract conditions.

   C. By mysterious disappearance or shortage disclosed on taking inventory unless such loss or shortage can be reasonably shown to have been occasioned by theft or attempted theft.

   D. Caused by latent defect, ordinary wear and tear, corrosion, erosion, inherent vice, or gradual deterioration, in and of themselves except for any loss or damage resulting therefrom.

   E. Due to faulty workmanship, faulty materials, and errors in design, in and of themselves, except for any loss or damage resulting therefrom.

   F. Cause by :

      (1) hostile or warlike action in time of peace or war, including action in hindering, combating, or defending against an actual, impending or expected attack:

(a) by any government or sovereign power (de jure or de facto), or by an authority maintaining or using military, naval or air forces; or

(b) by military, naval or air forces; or

(c) by an agent of any such government, power, authority or forces; it being understood that any discharge, explosion or use of any weapon of war employing nuclear fission or fusion shall be conclusively presumed to be such a hostile or warlike action by such a government, power, authority of forces;

(2) insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence, seizure or destruction under quarantine or customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade.

(3) Any act of any person acting on behalf of or in connection with any organization with activities directed towards the overthrow by force of the government de jure or de facto or to the influencing of it by terrorism or violence.

G. Nuclear:

(1) Loss or damage by nuclear reaction, or nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, or due to any act or condition incident to any of the foregoing, is not insured against by this policy, whether such loss be

direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by any of the perils insured against by this policy except that:

(a) This policy insures against loss by sudden and accidental radioactive contamination, including resultant radiation damage to the property covered, resulting directly from any perils such property is insured against, provided such radioactive contamination arises out of material on the Insured's premises at the locations insured by this policy, and provided, at the time of such loss, there is neither a nuclear reactor capable of sustaining nuclear fission in a self-supporting chain reaction, nor any new or used nuclear fuel which is intended for or which has been used in such a nuclear reactor, on the Insured's premises at the location insured.

(b) If fire or sprinkler leakage ensues, liability is specifically assumed for direct loss by such ensuing fire or sprinkler leakage but no including any loss due to nuclear reaction, nuclear radiation or radioactive contamination.

H. Special Exclusions

This policy does not insure against any increase of loss occasioned directly or indirectly from:

(1) enforcement of any law or ordinance regulations the construction, repair, replacement, use or demolition of property on the described premises, except that loss as

covered under Contingent Liability from Operation of Building Laws (Paragraph 36) and Decontamination expense (paragraph37) are specifically covered, or;

(2) interference at the described premises, by strikers or other persons, with rebuilding, repairing or replacing the property or with the resumption or continuation of business.

I. As respects Property in Transit:

(1) caused directly or indirectly by seizure or destruction under quarantine or customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade.

10. **TERRITORY**: This policy covers anywhere in the world.

11. **DEDUCTIBLE**: in consideration of the premium paid, it is agreed that in the event of loss or damage from one occurrence of a nature insured hereunder, the maximum deductible shall be as follows:

A All locations are subject to a Business Interruption waiting period of ten (10) days (240 hours).

B In addition to A above, a combined Property Damage Business Interruption deductible, as scheduled below, also applies:

LOCATION	DEDUCTIBLE
Freeport, Tx	6,000,000
Oyster creek, Tx	6,000,000
Midland (Plant), MI	4,000,000
Plaquemine, LA	4,000,000
Terneuzen	4,000,000
Fort Saskatchewan	3,000,000
Sarnia	3,000,000
Stade	3,000,000
Aratu	2,000,000
Ludington, MI	2,000,000
Midland (Dow Center), MI	2,000,000
Pittsburg, CA (Plant)	2,000,000
Rheinmunster	2,000,000
Tarragona North	2,000,000
Allyn's Point, CT	1,500,000
Altona	1,500,000
Bay City (PLP Plant), MI	1,500,000
Botlek	1,500,000
Cartagena	1,500,000
Guaruja	1,500,000
Hanging Rock, OH	1,500,000
King's Lynn	1,500,000
Minneapolis, MN	1,500,000
Plaquemine, LA	1,500,000
Tarragona South	1,500,000
Bayonne (Eldorado), NJ	1,000,000
Bilbao (Axape Plant)	1,000,000
Drusenheim	1,000,000
Findlay, OH	1,000,000

LOCATION	DEDUCTIBLE
Fresno, CA	1,000,000
Ft. Saskatchewan, Ethylene Stg.	1,000,000
Joliet (Plant), IL	1,000,000
Joliet (Terminal), IL	1,000,000
Kina Ura	1,000,000
Licking River, OH	1,000,000
Cincinnati, OH	1,000,000
Kansas City, MO	1,000,000
Mauldin, SC	1,000,000
Midland, (Research Camp), MI	1,000,000
San Lorenzo	1,000,000
Talcahuano	1,000,000
Tessenderlo	1,000,000
Torrance, CA	1,000,000
Tsing Yi (Plant)	1,000,000

All other locations have a deductible of $500,000, unless otherwise noted on Endorsement No. 3 - Special Deductible Provisions.

Any location that has a Contingent Business Interruption ONLY will be subject to a ten (10) day waiting period only, they will not be subject to a combined deductible.

12. **DEFINITIONS**: The following terms wherever used in this policy shall mean:

A "Raw Stock": Material in the state in which the Insured receives it for conversion by the Insured into finished stock.

B "Stock in Process": Raw stock which has undergone any aging, seasoning, mechanical or other process of manufacture at the location(s) herein described but which

has not become finished stock.

C "Finished Stock": Stock manufactured by the Insured which in the ordinary course of the Insured's business is ready for packing, shipment or sale.

D "Merchandise": Goods kept for sale by the Insured which are not the product of manufacturing operations conducted by the Insured.

E "Normal": The condition that would have existed had no loss occurred.

F "Occurrence": Reference to loss arising out of one occurrence as used herein, means the sum total of all loss or damage insured against hereunder arising out of or caused by one event.

G "Flood": The term "flood" shall be held to mean a general and temporary condition of partial or complete inundation of normally dry land areas from:

(1) the overflow of inland or tidal waters,

(2) the unusual and rapid accumulation or run-off of surface waters from any source, or

(3) mudslide caused or precipitated by accumulation of water on or under the ground.

H Each loss by earthquake shall constitute single claim hereunder, provided, if more than one earthquake shock shall occur within any period of 72 hours during the term of his policy, each such earthquake shock shall be deemed to be a single earthquake within the meaning hereof.

I For the purpose of this insurance "gross earnings" are defined as the sum of the following:

(1) total net sales value of production (manufacturing operations),

(2) total net sales of merchandise (mercantile operations), and

(3) other earnings derived from operations of the business;

Less the Cost of:

(1) raw stock from which such production is derived,

(2) supplies consisting of materials consumed directly in the conversion of such raw stock into finished stock or in supplying the service(s) sold by the Insured,

(3) merchandise sold, including packaging materials therefor, and

(4) service(s) purchase from a outsiders (not employees of the Insured) for resale which do not continue under contract. In determining gross earnings, due consideration shall be given to the experience fo the business before the date of damage or destruction and the probable experience hereafter had no loss occurred.

J. The term "extra expense", wherever used in this form, is defined as the excess (if any) of the total cost incurred during the period of restoration chargeable to the operation

of the Insured's business, over and above the total cost that would normally have been incurred to conduct the business during the same period had no damage occurred. Any salvage value of property obtained or temporary use during the period of restoration, which remains after the resumption of normal operations, shall be taken into consideration in adjustment of any loss hereunder.

13. **VALUATION**: In case of loss to property insured hereunder, the basis of adjustment shall be as follows:

A Raw material, supplies and other merchandise not manufactured by the Insured - the replacement cost as of he time of settlement and place of loss.

B Work in process - value of raw material, labor and applicable overhead at time of settlement and place of loss.

C Finished goods - market value at the time of settlement and place of loss.

D Valuable papers, records, and data processing media - full reproduction cost as of th time of settlement and place of loss, if replaced, otherwise at original cost to the Insured (including labor, material, supplies, research and development expenses and overhead).

E Animals - replacement cost at time of settlement and place of loss. This shall include, but not be limited to original cost, labor, material, supplies, research and development expenses and overhead.

F Property in transit - amount of invoice, including prepaid or advanced freight, if any, the profit or commission of the named Insured as selling agent, and such other costs and

charges as may have accrued and become legally due thereon since shipment. In the absence of an invoice, the property shall be valued at its actual cash value at point of shipment.

G All other property - actual cash value at time of settlement and place of loss plus overhead, of any, unless required by contract to insure for full replacement value and in such case values will be reported on the same basis.

14. **DEBRIS REMOVAL:** This policy covers the Insured's expenses incurred in the removal of debris from property covered hereunder remaining after any loss hereby insured against.

15. **SUBROGATION**: This insurance shall not be invalidated should the Insured waive prior to a loss any or all right of recovery against any party for loss occurring to the property described herein. The right of subrogation against the Insured and/or subsidiary and/or affiliated Companies and/or any other Companies associated with the Insured through ownership or management and/or officers and/or employees of the Insured. Is hereby waived.

16. **OTHER INSURANCE**: The Company shall not be liable for loss if, at the time of loss there is any other insurance which would attach it this insurance had not bee effected, except that this insurance shall apply only as excess and in no event as contributing insurance, and then only after all other insurance has been exhausted except where required by contract to be primary.

17. **APPRAISAL**: If the Insured and the Company fail to agree as to the amount of loss, each shall on the written demand of either, made within sixty days after receipt of proof of loss by

the Company select a competent and disinterested appraiser, and the appraisal shall be made at the reasonable time and place. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen days to agree upon such umpire, then, on the request fo the Insured or the Company, such umpire shall be selected by a judge of a court of record in the state in which such appraisal and umpire. The Company shall not be held to have waved any of its rights by any act relating to appraisal.

18. **SUE AND LABOR**: In case of loss, it shall be lawful and necessary for the Insured, his or their factors, servants and assigns, to sue, labor, and travel for, in and about the defense, safeguard and recovery of the property insured hereunder, or any part thereof, without prejudice to this insurance, nor shall the acts of the Insured or the Company, in recovering, saving and preserving and the property insured in case of loss be considered a waiver or and acceptance of abandonment. The expenses so incurred shall be borne by the Insured and the Company proportionately to the extent of their respective interests. The Company's portion of such expenses shall be limited to the extent that such expenses reduce the loss which would otherwise be payable under this policy. This provision does not increase any amounts or limits of insurance provided by this policy and deductible provisions shall apply to any expenses so incurred.

19. **CARRIERS OR BAILEES**: This insurance shall not inure directly or indirectly to the benefit of any carrier nor without the affirmative consent of the Insured, to the benefit of any other bailee. The Insured may accept without prejudice to this insurance the ordinary bills-of-lading used by common carriers, including released or partially released value bills-of-lading, and the Insured may waive subrogation against railroads under Side Track Agreements. The Company shall

not be liable for any loss or damage which, without its consent, has been settled or compromised by the Insured.

20. **WAIVER**: All of the conditions contained herein or subsequently endorsed shall supersede and entirely replace all conditions appearing in the policy to which this form is attached.

21. **ASSIGNMENT**: Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon.

22. **CANCELLATION**: This policy may be cancelled either by the Insured or by the Company by mailing to the other at the address shown in this policy written notice stating when not less than ninety (90) days hereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice as effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the Insured or the Company shall be equivalent to mailing. If the Insured or the Company cancels, the Company shall refund the excess of paid premium above the pro-rata premium for the expired time. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective.

23. **ERRORS AND OMISSIONS**: This insurance shall not be prejudiced by any unintentional error or omission by the Insured.

24. **LOSS REINSTATEMENT**: Except as respects losses subject to the annual aggregate limits of liability shown in Clause 3. of this policy, loss hereunder shall not reduce the amount of this policy.

25. **CONTROL OF DAMAGED PROPERTY**: The Insured shall retain full rights and control of damaged property. Any salvage value recoverable by the Insured shall be applied against the amount of the total loss.

26. **BUSINESS INTERRUPTION INSURANCE**: In the event of loss or damage insured against hereunder during the term of this policy to the property described herein which necessitates the partial or total suspension of business, the Company shall be liable for the actual loss sustained by the Insured resulting directly from such interruption of business, but not exceeding the reduction of gross earnings less charges and expenses which do not necessarily continue during the interruption of business, for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such part of the property as has been damaged or destroyed, commencing with the date of such damage or destruction and not limited by the date of expiration of the policy, provided, however, a producing facility shall not be presumed to have been rebuilt, repaired, or replaced until such time as production therefrom is realized in quantity and quality equal to that reasonably expected had no loss occurred.

27. **RESUMPTION OF OPERATION**: It is a condition of this insurance that if the Insured could reduce the loss resulting from the interruption of business:

    A by complete or partial resumption of operation of the property herein described, whether damaged or not, or

    B. by making use of raw stock, stock in process, finished stock merchandise or other property at the location(s) described herein or elsewhere,

    such reduction shall be taken into account in arriving at the amount of loss hereunder.

28. **EXPENSE TO REDUCE LOSS**: This policy also covers:

A. such expenses as are necessarily incurred for the purpose of reducing loss under this policy, and

B. such expenses, in excess of normal, as would necessarily be incurred in replacing any finished stock used by the Insured to reduce loss under this policy,

but in no event shall the aggregate of such expenses exceed the amount by which the loss otherwise payable under this policy is thereby reduced.

29. **EXTRA EXPENSE**: In the event of loss or damage to a non-manufacturing facility, whether or not on a manufacturing premises, this policy also covers the necessary extra expense incurred by the Insured to continue the normal conduct of the Insured's business.

30. **IMPOUNDED WATER**: In the event that water is used as a raw material or for power or for other manufacturing purpose, stored behind dams or in reservoirs is released from storage as a result of damage to or destruction of such dam or reservoir by loss of a nature insured hereunder this policy covers loss, if any, directly resulting from the interruption of business caused by lack of adequate water supply from such sources, limited, however to not exceeding thirty (30) consecutive days after such length of time as would be required with the exercise of due diligence and dispatch to repair or replace the damaged or destroyed dam or reservoir.

31. **ALTERATIONS, ADDITIONS AND RENOVATIONS**: This policy also insures business interruption loss due to damage or loss to property while in the course of construction, erection and/or installation.

In the event of loss or damage insured against to property under construction and insured by this policy, the measurement of the resulting actual loss sustained shall be in accordance with the following:

A. Computed for a period of time equivalent to the time in which, with due diligence and dispatch, the property could be repaired or replaced. This equivalent period of time shall be applied to the experience of the business after the business has reached planned level of production or planned level of business operations. Neither period of time mentioned above is limited by the day of expiration named in this policy.

B. In determining the indemnity payable under this clause, due consideration shall be given to the available experience of the business compiled after completion of the construction.

32. **INACCESSIBILITY TO PROPERTY**: The business interruption coverage afforded hereunder is extended to include the Insured's loss if access to the Insured's property is prohibited by order of civil authority or is impossible because of loss or damage to property of others in the vicinity when such loss or damage is of the type insured under this policy.

33. **SERVICE INTERRUPTION**: This policy, subject to all its provisions and without increasing the amount of said policy, also insures against loss caused by damage to the property owned or used by any service supplier of electricity, gas, water, steam, waste disposal, or similar services when used exclusively for the service of the Insured.

34. **CONTINGENT BUSINESS INTERRUPTION**: This policy also covers a business interruption loss at the Insured's

premises because of the inability of a supplier to deliver materials, supplies, and goods to the Insured or the inability of a customer to accept goods from the Insured as a result of damage of a nature insured hereunder to the property of the supplier or the customer.

35. **NON-PRODUCTIVE FACILITY CONTINUING EXPENSES**: This policy also covers such charges and expenses, including payroll, as must necessarily continue during the loss of use of such non-manufacturing facility to the extent that such charges and expenses including payroll would have been incurred had no damage or destruction occurred.

36. **CONTINGENT LIABILITY FROM OPERATION OF BUILDING LAWS**: This policy, subject to all its provisions, also insures against loss occasioned by the enforcement of any law or ordinance regulating the construction or repair of building(s) and/or structures and in force at the time such loss occurs, which necessitates the demolition of any portion of the insured buildings and/or structures not damaged, including;

A. cost of demolishing or clearing the site of undamaged portions of the building(s) and/or structures;

B. actual cash value at the time of the loss of the buildings(s) and/or structures, or any part thereof, damaged by perils insured against or demolished due to the enforcement of any law or ordinance;

C. increased cost of repair or reconstruction to conform with building laws;

D. loss due to the additional period of time required for repair or reconstruction in conformity with the minimum standards of such law or ordinance, 0of the buildings(s)

and/or structures described in this policy damaged by a peril insured against.

(THIS COVERAGE SHALL NOT COVER ANY INCREASE IN LOSS OCCASIONED BY THE ENFORCEMENT OF ANY LAW OR ORDINANCE REGULATING ANY FORM OF POLLUTION.)

37. **DECONTAMINATION EXPENSE**: In the event of loss or damage insured against hereunder, this policy also covers the reasonable cost of necessary decontamination of land, and real and personal property of the Insured.

This insurance does not apply to loss arising out of the correction of any condition which existed prior to the occurrence giving rise to the loss.

38. **REQUIREMENTS IN CASE LOSS OCCURS**: T h e Insured shall give notice to Timber Insurance limited, 1320 Waldo Avenue, Suite 200, Midland, Michigan 48642 as soon as practical o any loss which may reasonably be expected to exceed the deductible and protect the property from further damage that might result in extension of the period of interruption of business or other loss.

It shall be necessary for the Insured to render a signed and sworn proof os loss to the Company or its appointed representative stating: the place, time, and cause of the loss, damage, or expense; the interest of the Insured and of all others; the value of the property involved in the loss; and the amount of loss, damage or expense.

The Insured, as often as may be reasonably required, shall exhibit to any person designated by the Company all that remains of any property herein described, and submit to

examinations under oath by any person named by the Company and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of accounts, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by the Company or its representative and shall permit extracts and copies thereof to be made.

39. **AUTHORITIES EXCLUSION**: Notwithstanding any of the preceding provisions of this policy, except in respect of certain specific coverage(s) provided elsewhere in this Policy, this Policy does not insure against loss, damage, costs, expenses, fines or penalties incurred or sustained by or imposed on the Assured at the order of any Government Agency, Court or other Authority arising from any cause whatsoever.

40. **CONSEQUENTIAL LOSS**: In the event of direct damage insured hereunder to any covered property, should such damage, without the intervention of any other independent cause, result in a sequence of events which causes physical damage to other insured property, then there shall be coverage for the resulting loss.

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NOVATION AT INCEPTION

This Agreement is by and among The Dow Chemical Company ("Dow"), Timber Insurance Limited ("Timber") and Dorintal Reinsurance Limited ("Dorintal").

The parties stipulate and recite that:

A. Dow and Timber entered into various insurance agreements from the period 12/1/94 - 12/1/95.(Exhibit A is attached hereto) ("the Insurance Agreements").

B. Timber desires to be discharged from the performance of the obligations enumerated in the Insurance Agreements.

C. Dow desires to release Timber from obligations as described in the Insurance Agreements provided that Dorintal agrees to perform the obligations and to be bound by the terms of the Insurance Agreements.

For the reasons recited above, and in consideration of the mutual covenants contained herein, the parties agree as follows:

1. Dorintal shall perform, and be liable for, the obligations of Timber that are enumerated under the Insurance Agreements and Dorintal agrees to be bound by all the terms of the Insurance Agreements in every way retroactively as of its original effective date as if an original party thereto.

2. Dow releases Timber from all claims for any liability that has arisen or may have arisen in respect to the Insurance Agreements. Dow accepts the liability of Dorintal in lieu of the liability of Timber. Dow shall be bound by the terms of the

original contract in every way as if Dorintal was named in the original contract in place of Timber as a party thereto.

3. As between Dow and Timber, this agreement supersedes the Insurance Agreements and all the rights and obligations under the Insurance Agreements are completely extinguished.

4. Dorintal will receive credit for all premiums, reserves and paid losses since inception.

5. This agreement has been executed in triplicate, and all the parties to this agreement have received a signed copy of it.

6. Dow, Timber and Dorintal consent to all the provisions of this agreement.

In witness whereof, the parties hereto have caused this agreement to be executed by their respective officers duly authorized so to do.

THE DOW CHEMICAL COMPANY

by: /s/ G.A. Heinz

G. A. Heinz, Corp. Risk Mgr.
Print Name and Title

Date: December 5, 1995

DORINTAL REINSURANCE LIMITED

by: /s/Philip M. Roels

Philip M. Roels, Vice President
Print Name and Title

Date: December 15, 1995

TIMBER INSURANCE LIMITED

By: /s/ Paul D. Brink

Paul D. Brink, President
Print Name and Title

Date: December 15, 1995

EXHIBIT A

EFFECTIVE DATE	POLICY #	DESCRIPTION
1/1/95	DD68648-95	DOW PRODUCTS
12/1/94	DD68647-95	DOW EXCESS LIABILITY
12/1/94	DD68646-95	DOW POLLUTION
12/1/94	DD68638-95	DOW GLOBAL PROPERTY
12/1/94	DD68639-95	DOW GLOBAL PROPERTY XS
12/1/94	DD68642-95	DOW GLOBAL PROPERTY HPR
12/1/94	DD68650-95	DOW GLOBAL PROPERTY EQ

TIMBER INSURANCE LIMITED

P. O. BOX HM 1022 • 12 PAR-LA-VILLE ROAD
•HAMILTON HM08 • BERMUDA
Telephone (809-29) 2-3434 Telex 3561 WES A BA

ENDORSEMENT NO. 35

This Endorsement, effective June 1, 1995, forms a part of TIMBER INSURANCE LIMITED Policy No. 68638, issued to The Dow Chemical Company et al.

TEXAS OPERATIONS:

In the event of a Hurricane and outside contractors are requested to stay in the Plant for Hurricane duty, and their automobiles are damaged because of the Hurricane, Texas Operations will reimburse each contractor employee, who sustains automobile damage because of the Hurricane, up to $2,000.

In the event this payment is made it will be applied to the Texas Operations per occurrence combined deductible of $6,000,000.

All other terms and conditions remain unchanged.

TIMBER INSURANCE LIMITED

BY: /s/ Philip M. Roels
Philip M. Roels
Vice President

Executed this 30th day of August 1995

AFFIDAVIT OF GARY JOHNSON

BEFORE ME, the undersigned Notary Public, personally appeared Gary Johnson who upon his oath stated as follows:

1. I, Gary Johnson, am over the age of 18 years of age and of sound mind and body and am competent to make this affidavit. I have personal knowledge of the facts stated in this affidavit and they are true.

2. I am presently employed by the Comptroller of Public Accounts as Supervisor of the Insurance Tax Section of Tax Policy. As supervisor of insurance taxes my responsibilities include: Reviewing statutes, developing policies and rules, drafting proposed legislation and answering taxability questions.

3. Prior to coming to the Comptroller's Office I was employed by the Texas Department of Insurance. I transferred to the Comptroller's Office as a result of the transfer of the insurance tax function from the Texas Department of Insurance. My last position with the Department of Insurance was Director of Tax Administration. In that capacity my responsibilities included administering and collecting taxes, fees and assessments, drafting and evaluating agency rules and policies relating to insurance taxes, answering taxpayer inquiries about insurance taxes, statutes, rules and policies, and providing advice to agency personnel concerning tax issues, etc.

4. As a result of my duties, I am familiar with the construction of the Texas Insurance Code articles and the policies which have been implemented by the State Board of Insurance, the Texas Department of Insurance and Comptroller of Public Accounts in administering this tax. As a result of the transfer of the insurance tax function, the Comptroller has the statutory authority to administer, collect and assess taxes for all periods, including periods prior to the transfer of the function from the Texas Department of Insurance.

5. I am familiar with the facts of this case and the Texas statutory and premium tax filing requirements of licensed insurance companies, surplus lines agents and other entities subject to premium taxes under the Texas Insurance Code.

6. Texas insurance risks can be insured in one of four ways: From insurers licensed in Texas, from eligible surplus lines insurers through Texas surplus lines agents, from non-licensed insurers whereby the insured procures the insurance outside of Texas (independently procured), and from a non-licensed insurer whereby the insured procures the insurance inside this state (unauthorized insurance).

7. Licensed insurers are subject to a gross premiums receipts tax on the insurance premiums on Texas risks.

8. Surplus lines agents placing insurance through the surplus lines marketplace collect a 4.85% premium tax on the Texas portion of the risk, from the insured, at the time of the transaction. These agents file an annual tax report with the Texas Comptroller's Office.

9. Individuals "independently procuring" insurance are required to report and pay a 4.85% premium tax on the Texas portion of the risk to the Texas Comptroller's Office.

10. Non-licensed insurers writing insurance in this state are subject to an "unauthorized insurance" premium tax of 4.85%.

11. Independently Procured tax forms have been included in Franchise Tax Report packet mailings for most tax years beginning on or before 1980. Attached to my affidavit as Exhibit A are copies of the Texas independently procured tax forms and instructions for tax years 1991 - 1998.

12. Insurers domiciled in the United States, other than stipulated premium companies, local mutual aids and farm mutual companies, are required to file an annual statement with the National Association of Insurance Commissioners. The annual statements include on Schedule T, a breakdown of premiums allocated to each state based on locations of the risks. This information is used by tax auditors to verify premium

writings in Texas for each insurer, whether licensed or not licensed in Texas.

13. Independently procured taxes were administered and collected by the Texas Department of Insurance until 1995 when the authority for the collection was transferred to the Comptroller's Office.

14. Official records of the Texas Comptroller indicate that for tax year 1998, 2,537 companies reported and paid $7,351,436 in independently procured taxes. Attached as Exhibit B are copies of official records of the Texas Comptroller's Office for tax year 1993-1998 detailing the number of taxpayers and the amount of taxes collected under the independently procured statute. The records indicate payments of taxes at both 3.85% and 4.85% rates which reflect the two tax rates for this tax. The tax rate was changed in tax year 1993 from 3.85% to 4.85% and taxpayers still file and report taxes for periods prior to 1993.

15. The Texas Department of Insurance, prior to the transfer of the insurance tax function to the Comptroller's Office, adopted by rule the 1991 version of the independently procured tax form and instructions. Attached as Exhibit C is a copy of rule 28 TAC §7.51 adopting the tax form and instructions.

16. The substance of the independently procured tax forms and instructions has been the same since at least 1980 to the present.

17. As of 1996, at least 36 states have independently procured (direct procurement) tax statutes. Attached as Exhibit D is a copy of a schedule titled "Direct Procurement Tax Laws By State" produced by Kroll, Rubin & Fiorella LLP.

Further the Affiant sayeth not.

/s/ Gary Johnson
GARY JOHNSON

APPENDIX C

CAUSE NO. 9905725

DOW CHEMICAL COMPANY	§	IN THE DISTRICT
	§	
V.	§	COURT OF TRAVIS
	§	
CAROLE KEETON RYLANDER, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, and JOHN CORNYN, ATTORNEY GENERAL OF THE STATE OF TEXAS	§	COUNTY, TEXAS
	§	250TH JUDICIAL
	§	DISTRICT

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Dow Chemical Company files this Motion For Summary Judgment supported by the attached Affidavits of Nancy Kanter, Tracy Perry, and Ray Langenberg.

Summary

This is a taxpayer's suit following payment under protest of $427,148.80 for an independently procured insurance tax audit assessment by the Comptroller. The protest payment should be refunded to Dow because the independently procured insurance tax has been declared invalid by the United States Supreme Court.

Argument

The independently procured insurance tax is a tax on insurance policies covering Texas risks, but which were negotiated outside the state with an insurance carrier not licensed in Texas. In 1962, the United States Supreme Court declared that the Texas independently procured insurance tax violated the McCarran-Ferguson Act (15 U.S.C. § 1011), which was adopted by Congress through its constitutional power to regulate interstate commerce. *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S.451, 82 S. Ct. 1380 (1962). The Court held that the "power of Congress to grant protection to interstate commerce against state regulation or taxation . . . is so complete that its idea of policy should prevail." *Id.*, 370 U.S. at 456, 82 S. Ct. at 1384. Therefore, the State could not tax insurance procured outside the state because it was an activity protected by Congress under the McCarren-Ferguson Act through its power under the Commerce Clause. *Id.*

At the time of the *Todd Shipyards* case, the independently procured insurance tax statute was codified in article 21.38 § 2(e) of the Texas Insurance Code, which provided as follows:

> If any person, firm, association or corporation shall purchase from an insurer not licensed in the State of Texas a policy of insurance covering risks within this State in a manner other than through an insurance agent licensed as such under the laws of the State of Texas, such person, firm, association or corporation shall pay to the Board a tax of five per cent (5%) of the amount of the gross premiums paid by such insured for such insurance.

Todd Shipyards, 370 U.S. at.453, 82 S.Ct. 1382 at n. 2.

In 1967, the Texas Legislature repealed article 21.38, and in the same act, adopted article 1.14-1, which re-enacted the independently procured insurance tax. A copy of excerpts from the legislation is attached as Exhibit 1 to the Affidavit of Ray Langenberg. Acts of 1967, 60th Leg., R.S., ch. 185, 1967 Tex. Gen. Laws 401. *See also*, Tex. Ins. Code art. 21.38 (Vernon 1981) (Historical Note) and art. 1.14-1 (Vernon 1981) (Historical Note). The Comptroller contends that the new statute is constitutional. However, the Legislature cannot make a statute constitutional simply by repealing the old statute and adopting the same statute under a different section number.

The comparison of the current statute[1] and the former statute shows that the two statutes have the same operative terms. In fact, the Historical Notes to the Insurance Code state that the source of article 1.14- 1 is former article 21.38. *See* Tex. Ins. Code art. 1.14-1 (Vernon 1981) (Historical Note). The current statute provides:

> (a) Every insured who procures insurance in accordance with Section 2(b)(4) of this Article must file a report with the comptroller and pay an independently procured insurance tax of 4.85 percent.

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[1] Since Article 1.14-1 was adopted in 1967, the Legislature amended the article to substitute the Comptroller for the State Board of Insurance, to change the tax rate from 3.85% to 4.85%, and to reorganize the statute. However, the scope of the article has remained the same from 1967 to the present. *See* Acts of 1993, 73th Leg., R.S., ch. 685, 1993 Tex. Gen. Laws; Acts of 1993,73th Leg., R.S., ch. 999, 1993 Tex. Gen. Laws; Acts of 1995, 74th Leg., R.S., ch. 279, 1995 Tex. Gen. Laws.

Tex. Ins. Code art. 1.14-1 § 12(a) (Vernon Supp. 1998). The current statute references insurance procured "in accordance with Section 2(b)(4)", and that section describes:

> transactions involving contracts of insurance independently procured through negotiations occurring entirely outside of this state which are reported and on which premiums tax is paid in accordance with this Article.

Id. § 2(b)(4) (Vernon Supp. 1998).

According to Comptroller Form 25- 103 (attached as Exhibit 2 to the Affidavit of Ray Langenberg), the following criteria apply to independently procured insurance under the current statute:

1. The insurance contract was negotiated entirely outside of this state;
2. The insurance carrier is not licensed to place business in this state;
3. At least some of the premiums are on Texas risks; and
4. Taxes on the premium have not been paid by a surplus lines agent or a registered purchasing group.

The criteria of the current statute match the criteria of the old, invalid statute and the activity protected from taxation by the McCarren-Ferguson Act:

> . . . contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State. . .

Todd Shipyards, 370 U.S. at 455-56; 82 S. Ct. at 1383, quoting a Congressional House Report. The Legislature cannot make the tax constitutional by simply repealing the old statute and adopting the same statute under a different section number. Therefore, the assessment is invalid.

Conclusion

Plaintiff requests the Court to grant this motion for summary judgment and render judgment for Plaintiff refunding the amount paid under protest with interest provided by section 112.060 of the Texas Tax Code or section 403.211 of the Texas Government Code and costs of court.

Respectfully submitted,

SCOTT, DOUGLASS
& McCONNICO, L.L.P.
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600 Congress Avenue
Austin,Texas 78701
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By: /s/ Ray Langenberg
Mark W. Eidman
State Bar No. 06496500
Ray Langenberg
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